SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1358

MARY ELLEN COAKLEY, *Petitioner*

v.

F. M. REISING, ET AL., *Respondents*

REPLY BRIEF OF PETITIONER, MARY ELLEN COAKLEY

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Ellen Coakley, files this, her reply to the arguments first raised in the briefs of Respondents, F. M. Reising, et al, in opposition to her Petition for Writ of Certiorari.

Dissenting Opinion of Court Below

The dissenting opinion of the Court below contains information essential to this reply. For this reason, it is appended hereto as Appendix E.

Reply to Respondents' Argument on Jurisdiction

The foreclosure judgment and deeds upon which Respondents stand are invalid and Respondents cannot be innocent purchasers. The opposite conclusions of the Court below are indeed, erroneous conclusions of law, not findings of fact, and they cannot be sustained by the undisputed facts in this record. We will not repeat prior statements except to say that the authority covertly granted by the taxing authority to Respondents to settle taxes and seize title to Collins' land denied the owner of the land the essentials of due process of law. Respondents Reising and Conklin were participants in this arrangement. Neither they nor their pendent assigns can possibly be "innocent" of the illegal arrangement under which they undertook to purchase the land. The Court below simply did not face the embarrassing reasons why the action taken by a Texas municipal corporation was not valid.

Petitioner, in her *Questions Presented* and *Points*, has been specific in stating the manner in which the landowner (in whose shoes she stands) was here denied due process or equal protection of the laws. Essentially due process requires a fair notice to the landowner of *what the transaction is*, an opportunity for a hearing and right to settle taxes equal to that granted by the taxing body to strangers to the title. The uninformative foreclosure suit notice in question (SF X 257, X 247) served by the Water District upon *prior owners* and demanding payment of *all its taxes in full* on the land does not satisfy due process requirements of fair notice to any landowner. In *Walker v. Hutchinson*, 352 U.S. 112, 116, this Court has stated in language more apt than our own:

> *". . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."*

When in fact a tax settlement was made available to Reising and Conklin in mid-1942 at $15.00 per acre, no reason existed why the District should not be required to give the landowner fair notice thereof and a fair and equal right to be heard and, if he chose, to redeem his own land from taxes under the same terms. The Court below approved the jury's rather incredible finding that the District's officials did not have "actual notice" of the ownership of Collins—but this finding—even if correct—nowise answers the due process question. *The taxing body did not attempt to give a fair and informative notice, right of hearing or equal opportunity to any landowner*—even to the Page family, whom it admittedly knew to have been the owner of the land. The real arrangements under which taxes were settled in Respondents' favor and title seized for them were strictly a covert, preferential agreement—with notice of it provided to no one except Reising and Conklin.

There was no valid reason or emergency situation then existing which constitutionally authorized or justified a taking of another man's land in the manner that was done here. To hold otherwise would be to open a wide door to any government to arbitrarily discriminate in tax foreclosure matters as between different citizens and especially against non-resident landowners whose knowledge and opportunities of investigation of activities of local government are apt to be limited.

Reply to Respondents' Statement of the Case

Petitioner recognizes that a more full recitation of the facts of record should await the brief on the record.

Nevertheless, the nature of Respondents' statements compels her to reply to their arguments lest the Court be greatly misled as to what the record does show.

Respondents' statement, regrettably, appears to be replete with erroneous statements of facts as a most cursory reference to the record will plainly disclose. The framing of this argument creates the appearance of some attempt to so misstate facts and thus confuse this overburdened Court to the end that doubt may be created even as to facts which were proven without dispute.

The gist of what Respondents claim is that the evidence shows that the champertous arrangements between the taxing body and Respondents were really open and known to all. Thus, Respondents suggest, fair notice of the champertous arrangements was given to the landowners. Respondents (at page 10) say:

> "*There is not one iota of testimony of any covert arrangements with anyone in the whole record* and Petitioner draws all of her inferences from the escrow agreement shown at Appendix D of Petitioner's Brief and also as Exhibits X-228 and X-229."
>
> . . .
>
> "*What Respondents are attempting to say is that they dispute that there is evidence* of the proposition that Petitioner asumes in her brief, that is, they dispute that there was: (1) any fraud; (2) *any covert arrangements;* (3) *any champerty; and* (4) *any attempt to discriminate between persons. In addition to* the record, if arguments are set aside, *we have the finding of the jury and the approval of the Appellate Court* of the findings of these facts."

In its essence, this claim is completely untrue and quite unsupported by anything in this record. Respondents have

never previously even contended that the District gave any kind of notice of their champertous tax settlement arrangements to Petitioner or to any prior owner of the disputed land. It is undisputed that arrangements were privately made between the taxing body and Respondents. They were all in writing, shown by contracts, receipts and writings kept in the District's files of which the landowner was given no information whatsoever (SF X 206 - 213). Nothing was disclosed by Respondents concerning these covert arrangements in the 1949 trial (SF 339-48; 415-19; 329-339), or even the 1966 trial (SF 323-324) of these same cases. The fact is that throughout all those years Respondents managed to carefully conceal their real arrangements respecting this foreclosure from the landowners, and even from the Plaintiff during years of litigation. This record shows when the accidental discovery of documents disclosing the champertous arrangement occurred—on May 18, 1966. after Respondents, for a second time, had closed their case without revealing their champertous arrangements. (SF 238; 314; See extracts from 1966 Statement of Facts, Paragraph 1, Clerk's Certificate of February 17, 1971).

This record is utterly devoid of any sort of notice of the tax settlements claimed to be imparted to any owner of the disputed lands. Indeed, Respondents never tried to produce any evidence of any regulation or procedure under which fair notice of such arrangements might be given to the landowner.

The majority opinion of the Court below does not really discuss the covert nature of these arrangements. However the dissenting opinion does so, 457 S.W.2d 438, as follows:

> *"First, the plaintiff was denied the opportunity to cross-examine Reising concerning his champertous agreements with the water district. This was where Reising agreed with the water district to do certain things in exchange for a share of a subject matter and this fact was not discovered at the time the witness gave his former testimony.*
>
> . . .
>
> "During the last trial in 1966 he testified as to certain matters respecting his purchase of the land in question. At the end of his testimony he was excused from the trial. *Four days later on the final day of the former trial, written records of the champertous dealings by Reising were found and introduced into evidence. It was undisputed that the plaintiff did not know about these dealings at the time Reising was testifying.* There had been no cross-examination of Reising or inquiry of Reising *respecting these covert arrangements."*

We regret the necessity of presenting this argument, but Petitioner cannot permit Respondents' palpably untrue argument to stand unchallenged. Respondents themselves indirectly concede that Mr. Collins was, at the times in question, ignorant of the availability of tax settlement (at $15.00 per acre) with the taxing body when they say (at page 5):

> ". . . he decided to make no claim on the land which might saddle him with *so much in delinquent taxes and assessments."*

There is nothing in this record that discloses that Collins was offered any sort of an equal opportunity to settle out the delinquent taxes and assessments at the low and preferential figure granted to Respondents.

There are other areas in which Respondents' arguments are subject to correction. For example:

(1) Without citing the record, Respondents broadly state (at page 5) that:

> ". . . J. M. Collins intentionally left his deed off the record, probably with fear that he would be charged with taxes and assessments against the land . . ."

The record shows without dispute that Collins, who died on January 27, 1942, did not conceal his ownership of these Page lands. It is undisputed prior to the August 14, 1942, tax foreclosure suit, J. M. Collins wrote the District contesting the taxes, saying he was interested in the land, threatening action if he lost an acre of it through foreclosure and ". . . do not push me too hard" (X 164). This letter was admittedly received by the District's general counsel who later handled the foreclosure suit (SF 306; 415-417). The immaterial intention ascribed to Collins, if true, is not supported by affirmative evidence.

(2) Respondents state obscurely that, at page 6 et seq. of their brief, they present a "true abstract of title." However, the principal deed dated March 24, 1941, relied upon by Petitioner (SF X-024) is obviously not put in its proper chronological order on page 6 of the so-called abstract. See complete discussion of this deed, 436 S.W.2d 316. It has always been a conceded fact that several of the deeds in Petitioner's chain of title were not timely recorded—but it is also unquestionably true that she owns title to the land unless her title was cut off by the foreclosure judgment under which Respondents claim.

(3) Attempting to evade the question of a lack of notice by the taxing body to the landowner, Respondents (at page 9) state as a fact:

> "The evidence would show that the landowner investigated at the Water District's office and could have received all of the information available if he did not and *that he purposely withheld from the Water District's officials notice of his interest in the land.*"

While the undisputed evidence discloses an investigation by Will Collins, it does not show any concealment of his interest in the land. The converse is true. Two witnesses—one of them an independent witness—testified below that about July 1, 1942, Will Collins told Abney, the duly authorized Land Commissioner (SF 301), that he had "heired" the Page lands and, indeed, showed Abney the March 24, 1941, deed (SF 155; SF 150-152; SF 93). Abney had no independent recollection of the meeting but did not deny that it took place (SF 267-68). Obviously, the burden was not upon the non-resident farmer to surmise the existence of a pending settlement of taxes on his land but rather upon the taxing authority to give him fair notice of this settlement and an equal chance to protect his property.

(4) At page 10, Respondents speak of the land being overburdened with taxes and considered worthless in this light by the predecessor in title to Petitioner. This is true for—we have stated—there were, indeed, $150.00 per acre in taxes against this land at the time in question. But the District officials themselves were the persons who left the impression with Collins that there were more taxes against the land that it was worth (SF 342-345). Obviously, they did not disabuse him of this discouraging thought or in-

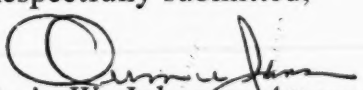
form that taxes had already been settled to the benefit of two strangers to the title at only $15.00 per acre.

(5) Respondents say, at page 10, that these suits occurred "during the great depression. . .". The facts show that the champertous agreements commenced on May 29, 1942 (SF X-205), the flat rate foreclosure suit commenced on August 14, 1942 (SF X-257), and the ultimate deeds to Respondents were on January 28, 1943 (SF X-241-244). The Court itself can draw its own conclusions as to the accuracy of this statement, remembering what happened to land prices during the war years.

Nothing in Respondents' statements or arguments offers any reasonable justification for the refusal of this taxing body to give fair notice of the tax settlement arrangements under which Respondents claim to have acquired their title or to grant an equal right of settlement to the landowner. The foreclosure proceeding was patently unfair, unequal and wanting in due process.

The judgment of foreclosure upon which Respondents' claims to this title depend should be declared invalid but the case must be remanded to the Court below for findings on the damage issues.

Respectfully submitted,



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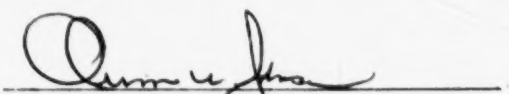
CERTIFICATE

I, Orrin W. Johnson, do hereby certify that a copy of the above and foregoing Reply Brief of Petitioner, Mary Ellen Coakley, has been served upon Respondent, F. M. Reising (whose attorney has withdrawn), at 310 West Fay, Edinburg, Texas 78539, and E. G. Henrichson, of Henrichson & Bates, P. O. Box 117, Edinburg, Texas 78539, counsel for remaining Respondents, by depositing a copy of said Reply Brief in the United States Post Office, first class postage prepaid, this 25th day of March, 1971.



ORRIN W. JOHNSON

APPENDIX E

NUMBER 548

IN THE

Court of Civil Appeals

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT CORPUS CHRISTI, TEXAS

MARY ELLEN COAKLEY, *Appellant*

V.

V. N. CROW, ET AL, *Appellees*

On appeal from the 93rd District Court of Hidalgo County, Texas.

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457 S.W.2d 431, at 438

DISSENTING OPINION

NYE, Justice (dissenting).

I respectfully dissent. The majority of this Court by affirming the judgment of the trial court had to approve the hearsay testimony of defendant F. M. Reising. The

facts and the rules relative to the admissibility of the hearsay testimony of a party from a former trial have been fairly set out in the majority opinion of this Court. However, I believe that such evidence did not qualify for admissibility under the rules set down by the Supreme Court in White v. Natural Gas Pipeline Company of America, 444 S.W.2d 298 at 302 (Tex. Sup. 1969) for at least three reasons. First, the plaintiff was denied the opportunity to cross-examine Reising concerning his champertous agreements with the water district. This was where Reising agreed with the water district to do certain things in exchange for a share of a subject matter and this fact was not discovered at the time the witness gave his former testimony. Second, the witness was not "unavailable" to testify as the rule has been defined by the Supreme Court and by other judicial decisions in this State. Third, there was no effort to take the witness' deposition before the trial.

Reising was a party defendant in the law suit. At the time of the present trial he was considered only a nominal party since he and the plaintiff had settled their damage claims against each other. Reising had testified in two prior trials, one of which he was, then, the sole defendant. During the last trial in 1966 he testified as to certain matters respecting his purchase of the land in question. At the end of his testimony he was excused from the trial. Four days later on the final day of the former trial, written records of the champertous dealings by Reising were found and introduced into evidence. It was undisputed that the plaintiff did not know about these dealings at the time Reising was testifying. There had been no cross-examination of Reising or inquiry of Reising respecting these covert arrangements. He did not volunteer such

admission. His credibility as to good faith was not in issue then in the same light as it was in this trial.

The rule is, that statements made in evidence upon a previous proceeding may be received upon a subsequent trial as evidence of the truth of such statements where the witness is unavailable, provided the party against whom the evidence is now offered had the opportunity to cross-examine the witness at the former trial upon the *same issue as that upon which the evidence is now offered.* (emphasis supplied) McCormick and Ray on Evidence, §942, p. 720; Hafer v. Prashner, 413 S.W.2d 759 (Tex. Civ. App.—Corpus Christi 1967) and authorities cited therein. The hearsay evidence relied upon in this trial, was offered to show among other things that Reising had made "good faith" improvements on the land following his purchase. He testified that he had paid the consideration called for in the deed. There was evidence from other witnesses that the amount Reising had paid was extremely low. There was no opportunity to cross-examine Reising relative to the champertous arrangements he had made with the water district relative to such purchase. The evidence was offered by appellees undisputedly to prove at least in part, Special Issue No. 17 inquiring whether or not Reising had acted in good faith in purchasing the land in question, to which the jury answered: "Yes".

It was undisputed that Reising was a resident of Edinburg the county where the case was tried. It was also undisputed that his deposition had never been taken during the 22 years this cause has been pending. Appellees admit that his testimony was vital and very material to their defense. It was undisputed that defendant Reising had gone to Oklahoma on a vacation and would return on

October 20. The defendants issued a subpoena for Reising on October 3 and four days later learned of his absence because of his vacation. On October 13, the day trial commenced, appellees presented their motion for continuance because Reising was absent. This was overruled by the court. Later the trial court admitted Reising's testimony over appellant's objection.

The Court in Morris v. Davis, 292 S.W. 574 (Tex. Civ. App.—Austin 1927, wr. ref.) discussed the various rules that had been formulated by judicial decision based upon the common law. One such rule was that a party does not have the right to prove what a particular witness testified to on a former trial of the case merely because that witness has gone to and resides in another state. He must show in addition, that he cannot procure the evidence of the absent witness by deposition or otherwise. The Court, in discussing the common law rule and testing the basis for its admissibility said: "It is clear beyond dispute that the purpose of the rule requiring the 'whereabouts' of the witness to be unknown, before his former testimony is admissible, was to require the taking of his deposition when his 'whereabouts' is known, even though his residence be beyond the limits of the state. Or, as said by Judge Key, 'conditions which render it reasonably certain that he cannot procure the evidence of the absent witness by deposition or otherwise' should be shown by the party offering it."

The rule relative to the unavailability of a witness to testify where the excuse is that he is "beyond the jurisdiction of the court" must be interpreted to mean that his unavailability from the state is more than temporary. This is true because all of the excuses that are set forth

in the rule are based upon a rather permanent condition: such as 1) whereabouts are unknown and that a diligent search has been made to ascertain his whereabouts; 2) that he has been kept away from the trial by an adverse party; 3) physically unable to testify; 4) insane; 5) dead; and 6) finally beyond the jurisdiction of the court. The Supreme Court in White v. Natural Gas Pipeline Company of America, supra, said each and every one of these requirements is essential in establishing the proper predicate for the admissibility of the evidence. The exercise of discretion by the trial court, is limited by a determination of the sufficiency of the factual predicate in the situation claimed to exist. Houston Fire & Casualty Insurance Company v. Brittian, 402 S.W.2d 509 (Tex. Sup. 1966). There was no evidence before the trial court that the witness' absence beyond the jurisdiction of the court was anything other than temporary. There was no evidence that there had been any attempt to secure the deposition testimony of the absent witness. I would hold the trial court abused its discretion in this respect.

The Supreme Court in the Brittian case, supra, in discussing the Morris v. Davis case, (writ refused) stated: "* * * there was disagreement among members of the court but none questioned the soundness of the rule in Lone Star Gas; Morris v. Davis, * * *" (Emphasis supplied.) and citing other authorities. The court in the White case, supra, in holding that the evidence admitted was error, stated that the deposition of the witness could have been taken but wasn't.

The trial court in this case had only to wait approximately one week for the return of the witness to make

his testimony available in person and subject to cross-examination. The appellee and even the defendant Reising (the absent witness) knew of the trial setting but appellee made no effort to take Reising's deposition. This, of itself, precludes the use of the former testimony. Stohn v. Bryant, 283 S.W.2d 299 (Tex. Civ. App.—Dallas 1955, ref. n.r.e.); Morris v. Davis, supra. Reising's testimony taken from two other trials was clearly secondary evidence. There was no matter of necessity existing in this trial that would compel the trial court to authorize the use of this evidence by appellee.

I would hold that the admission of such testimony under the circumstances of this case was calculated to and probably did cause the rendition of an improper judgment. Houston Fire & Casualty Insurance Company v. Brittian, supra; White v. Natural Gas Pipeline Company of America, supra; and Rule 434, T.R.C.P. The judgment should be reversed and the cause remanded.